89-1266

Supreme Court, U.S.
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No.__

In The

Supreme Court of the United States

October Term, 1989

CHARLES CHAMBERLIN
Petitioner,
vs.
UNITED STATES OF AMERICA
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Whether a member of the military who suffers injury in a medical facility as the result of the negligence of the physicians treating him should be barred from maintaining his cause of action for negligent medical treatment under the Federal Tort Claims Act, 28 U.S.C. §1346(b) and §2671, et seq., under the doctrine of Feres v. United States, 340 U.S. 135 (1950), when the facility and treatment are not directly related to combat or military actions.

TABLE OF CONTENTS

Page

STATEMENT OF QUESTIONS PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES iii

REFERENCE TO THE CASE IN THE COURTS BELOW iv

JURISDICTIONAL STATEMENT 1

REFERENCE TO PERTINENT STATUTORY- AND CONSTITUTIONAL PROVISIONS 1

STATEMENT OF THE FACTS AND OF THE CASE 1-4

ARGUMENT IN SUPPORT OF PETITION 5-14

CONCLUSION AND REQUEST FOR RELIEF 14

CERTIFICATE OF SERVICE 15

APPENDICES

1. Order of the United States Court of Appeals for the Sixth Circuit in Charles Chamberlin v. United States of America, Case No.: 89-3126 1

2. Memorandum and Order of December 20, 1988 of the United States District Court for the Southern District of Ohio, Eastern Division in Charles Chamberlin, et.al., v. United States of America,
Case No.: C-2-86-0869. 2-5

3. Memorandum and Order of June 9, 1987 of the United States District Court for the Southern District of Ohio, Eastern Division in Charles Chamberlin, et al., v. United States of America,
Case No.: C-2-86-0869. 6-16

4. 28 U.S.C. §1346 17

5. 28 U.S.C. §2671 et. seq 18

TABLE OF AUTHORITIES

Page

CASES

Chappel v. Wallace, 462 U.S. 296 (1983) 13

Feres v. United States, 340 U.S. 135 (1950) 4,5,6

Parker v. United States, 611 F. 2d 1007 (5th Cir. 1980) 11

Sidley v. United States, 861 F. 2d 988 (6th Cir. 1988) 12

Stencel Aero Engineering Corp. v. United States,

431 U.S. 666 (1972) 6

United States v. Brown, 348 U.S. 110 (1954) 7

United States v. Johnson, 481 U.S. 681 (1987) 8

United States v. Shearer, 473 U.S. 52 (1985) 6,7,8

STATUTES

Federal Tort Claims Act (FTCA), ... 1,5

28 U.S.C. §1346(b) and §2671, et. seq. 1,5

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REFERENCE TO THE CASE

IN THE COURTS BELOW

1. Trial Court: Charles Chamberlin and Romonia Chamberlin v. United States of America (December 20, 1988), United States District Court for the Southern District of Ohio, Eastern Division, Case No.: C-2-86-0869, unreported.

2. Court of Appeals: Charles Chamberlin v. United States of America (September 27, 1989), Sixth Circuit Court of Appeals, Case No.: 89-3126, unreported.

JURISDICTIONAL STATEMENT

By Order and Entry of September 27, 1989, the Sixth Circuit Court of Appeal affirmed the District Court's December 20, 1988 dismissal of Petitioner's claim under the Federal Tort Claims Act (FTCA), 28 U.S.C. §1346 and §2671, et seq.

Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. §1254(1), and Rule 20 of the Rules of the Supreme Court of the United States. 28 U.S.C. §1254(1) verbatim provides:

> Cases in the courts of appeal may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

CONSTITUTIONAL PROVISIONS AND STATUTORY AUTHORITY RELEVANT TO CASE

1. 28 U.S.C. §1346
2. 28 U.S.C. §2671, et seq

STATEMENT OF THE FACTS AND OF THE CASE

In August, 1983, Petitioner, Charles Chamberlin, was serving as an Electrician's Mate Firearm Apprentice with the United States Navy in South Carolina. On or about August 27, 1983, while on weekend leave from the naval base, the Petitioner was thrown from a pick-up truck and sustained a head injury. At

the time of the injury, the Petitioner was with friends who reported that the Petitioner was then taken to the emergency room at the Naval Regional Medical Center in Charleston, South Carolina. The emergency room records initially indicate that Petitioner was oriented to person only and combative. The records further note a 2 $^{1}/_{2}$ to 3 inch laceration of the scalp which required stitches. The physicians at the hospital requested neither skull x-rays nor cervical spine x-rays. Approximately eight hours later, the Petitioner was discharged from the hospital, although he required assistance to be dressed and complained of a headache. A few days later, the Petitioner was found unconscious in his barracks. He was then re-hospitalized and remained comatose for approximately five days. The Petitioner suffered from post traumatic amnesia for approximately two weeks. The latter set of hospital records indicate that Petitioner sustained bifrontal contusions, left frontal-temporal cerebral hematoma and occipital skull fracture. The Petitioner was hospitalized off and on until October, 1983. The Petitioner then returned home to central Ohio, where he was seen at an outpatient clinic. At that time, he was diagnosed as having Organic Personality Syndrome. As a result, the Petitioner has suffered permanent brain damage, resulting in personality change; auditory and visual hallucinations; has become paranoid; irritable with temper outbursts and shows signs of reduced dexterity as well as attentional deficits.

The Petitioner, Charles Chamberlin, and his mother, Romonia Chamberlin, filed a malpractice suit against the government under the Federal Tort Claims Act (FTCA), 28 U.S.C. §1346

and 28 U.S.C. Chapter 17 alleging, in part, that he sustained serious and permanent injuries as a result of the negligence of Respondent's agents, servants and employees, i.e. the failure of the physicians in the Naval Regional Medical Center to diagnose and treat Petitioner. On October 9, 1986, the United States filed a motion to dismiss for failure to state a claim upon which relief may be granted and for lack of subject matter jurisdiction. On June 9, 1987, the District Court for the Southern District of Ohio, Eastern Division, denied the Respondent's motion to dismiss the Petitioner, Charles Chamberlin's claim. However, the court dismissed plaintiff, Romonia Chamberlin's claim because she failed to file a claim with the appropriate federal agency within the period of time prescribed by the FTCA. Her claim was not appealed. Thereafter, the government filed a motion for reconsideration on March 3, 1988. The District Court, in a memorandum and order filed December 20, 1988, found that it lacked subject matter jurisdiction to consider the merits of Petitioner's claims and granted the Respondent's motion to dismiss. The predicate for the ruling was that immunity, pursuant to Feres v. United States, 340 U.S. 135 (1950), barred the claim. Petitioner, Charles Chamberlin, timely filed an appeal from the 12/20/88 order to the Sixth Circuit Court of Appeals. Thereafter, by order and entry of September 27, 1989, the Sixth Circuit Court affirmed the district court without comment. This Petition was then timely perfected.

ARGUMENT IN SUPPORT OF PETITION

QUESTION PRESENTED FOR REVIEW

WHETHER THE TRIAL COURT ERRED IN GRANTING THE RESPONDENT'S RENEWED MOTION TO DISMISS WHEN THE PETITIONER'S COMPLAINT ESTABLISHES A VALID CAUSE OF ACTION.

A. THE TRIAL COURT ERRED IN APPLYING THE FERES DOCTRINE TO THIS CASE BECAUSE NONE OF THE CONSIDERATIONS SUPPORTING THE FERES DOCTRINE ARE PRESENT IN THIS CASE.

The Petitioner alleged in his complaint that he was filing his claim pursuant to the Federal Tort Claims Act, 28 U.S.C. §1346(b) and 2671, et. seq. (hereinafter FCTA). Congress provided in the FTCA that the United States is liable for "injury...caused by the negligent or wrongful act or omission of any employee of the Government...under circumstances where the United States, if a private person, would be liable to the claimant..." 28 U.S.C. §1346(b). In passing the FTCA in 1946, Congress did not exclude military personnel from the FTCA coverage. However, in Feres v. United States, 340 U.S. 135 (1950), the Supreme Court created an exception to the government's liability in relations to members of the Armed Forces. This exception, informally known as the Feres doctrine, immunized the government from liability under FCTA "for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." Id. at 146. Three factors underlie this exception: (1) the distinctively federal nature of the

relationship between the government and the members of its Armed Forces; (2) the availability of alternative compensation systems; and (3) the fear that if such claims are generally permitted, it would involve the judicial system in the military disciplinary system. Stencel Aero Engineering Corp. v. United States, 431 U.S. 666, 671-72 (1972).

In United States v. Shearer, 473 U.S. 52 (1985), the Supreme Court found that the main concern of the Feres doctrine is that of second guessing the military decisions of the impairment of military discipline. Id. at 57. The Shearer case involved a mother who brought suit under the FTCA for the death of her son, allegedly caused by the Army's failure to supervise its personnel. The decedent, who was off duty and away from the base, was kidnapped and murdered by another serviceman, who had previously been convicted of manslaughter. The Supreme Court barred the mother's claim on the basis that the complaint "calls into question basic choices about discipline, supervision and control of servicemen." Id. at 58. The court held that the important consideration is whether or not the claim requires the courts to second-guess military decisions and whether the suit might impair essential military discipline. If this type of claim were allowed, officers in the military would be required to justify the wisdom of their military decisions to a civilian court. Id. at 57-58. The dangers inherent in this possibility stem from the peculiar relationship of the servicemen and his superior and the high degree of discipline involved in that relationship. The Supreme Court, in Shearer, also indicated that courts must take a case-by-case approach to claims of immunity:

> The Feres doctrine cannot be reduced to a few bright line rules; each case must be examined in light of the statute as it has been construed in Feres and subsequent cases. Here, the Court of Appeals placed great weight on the fact that Private Shearer was off duty and away from the base when he was murdered. But the situs of the murder is not nearly as important as whether the suit might impair essential military disciple. Id. at 57. (Citations omitted)

The Supreme Court made clear in Shearer, that the paramount concern is that of military decisions or discipline. Thus, the courts must first determine the effect of a particular serviceman's claim on a military decision or discipline. The fears expressed by the Supreme Court in Shearer are not present in the Petitioner's claim because the court will not need to second-guess any military decisions or military disciplines. The Petitioner's claim is based upon common law negligence of a doctor and is not based upon any military relationship.

Other Supreme Court cases have offered some guidance in determining whether or not a serviceman is injured incident to service, and have allowed recovery under FTCA. In United States v. Brown, 348 U.S. 110 (1954), the Supreme Court helped to define the line which necessarily must be drawn between what should be considered "incident to service" and what should not be considered. In Brown, a doctor at a veteran's hospital negligently performed an operation to correct injuries resulting from an active duty

injury. In allowing the serviceman's claim, the court utilized policy reasons to support their position. The court stated:

> Certainly this claim is one which might be cognizable under local law, if the defendant were a private party. Responsibility of hospital to patients for negligence may not be as notorious as liability of the owners of automobiles. But the doctrine is not novel or without support. Id. at 113.

The Respondent, in the instant case, should be held liable to the same extent as private citizens. If a private citizen had negligently treated the Petitioner, he would have been liable under a common law action. Therefore, in order to uphold the Congressional purpose of the FTCA, Petitioner submits that the Respondent must be held accountable for its negligent act in treating the Petitioner.

One of the most recent Supreme Court decisions is that of United States v. Johnson, 481 U.S. 681 (1987). In a strongly divided opinion, the Johnson court held that the Feres doctrine bars a FTCA action on behalf of a service member killed during an activity incident to service, even if the alleged negligence is by civilian employees of the federal government. Id. at 686-692. The Supreme Court reiterated its position that suits brought by servicemen for injuries incurred incident to service are:

> [B]arred by the Feres doctrine because they are the 'type[s] of claims that, if generally permitted, would involve the judiciary in sensitive military

> affairs at the expense of military discipline and effectiveness.'...a suit based upon service-related activity necessarily implicates the military judgments and decisions that are inextricably intertwined with the conduct of the military mission. Id. at 690-691. (Citations omitted)

In applying this analysis to the instant case, there is nothing in Petitioner's case that could possibly undermine military decision making or military discipline. Petitioner was treated negligently by doctors in a non-field military hospital for a head injury sustained off base while on furlough. At the time of his treatment, Petitioner was not subject to any real military order or the performance of military duties. There was no command relationship between Petitioner and his physician. Furthermore, there were no military or discipline considerations governing the treatment of Petitioner by the doctor. The case at bar does not deal with this occurrence of negligence by the government arising out of a decision requiring military expertise or judgment, which Feres and its progeny sought to protect. Thus, a court hearing Petitioner's claim will not have to inquire into any military decisions or military discipline. The care provided by a physician to Petitioner in the emergency room, cannot be characterized as military in nature. Petitioner Chamberlin's injuries have nothing to do with his military service since he wason furlough at the time of his injury.

Other federal court decisions have expounded on the Feres test and developed standards for determining whether or not the injury was incurred incident to service. In Parker v. United States,

611 F.2d 1007 (5th Cir.), the Fifth Circuit Court of Appeals held that when a serviceman is injured off duty, off base and not subject to direct military control, he may recover under the FTCA. In the Parker case, a serviceman, on his way home after work, was hit head on by another serviceman. Parker died as a result of the injuries sustained in the accident. The car accident occurred on an Army maintained road and Parker was wearing his military fatigues. His family received veteran benefits. As usual, the court discussed the possible inherent dangers of allowing recovery. The court discussed the meaning of the phrase "incident to military service." The Parker case reasoned that Parker's four day pass was a furlough and thus, not incident to service. The court went on to state:

> The discipline connection does not appear to exist here. In the factual determination in any in case, it may be possible that the service member was performing duties of such character that traditional concepts of military discipline would be undermined should an FTCA action be permitted. Nevertheless, in this case, a suit by one leaving the base to attend to his personal affairs, while under no military supervision, will not interfere with military discipline. Id. at 1013 (Emphasis added.)

In applying the three point analysis of Parker, to the case at bar, Petitioner was not injured incident to service. Petitioner had authorized leave (liberty) from the base; the injury occurred off the base. The malpractice occurred at a naval hospital that also

accepted civilian patients; and most importantly, Petitioner was not directly under military control. Thus, this eliminates the problems recognized in Parker and other cases. Therefore, applying the test of Parker, the appellant has a valid claim under the FCTA.

In sustaining Respondent's Motion for Reconsideration, the District Court relied upon the Sixth Circuit's recent decision of Sidley v. United States, 861 F.2d 988 (6th Cir. 1988). The Sidley case is distinguishable. All cases, including Feres, Shearer and Sidley, recognize generally that "an off-duty serviceman not on the military base and not engaged in military activity at the time of the injury can recover under the FCTA". See Sidley, 861 F.2d at 990. The three factors justifying the Feres doctrine, which bar servicemen's claims, are not applicable here.

First, the government is not liable for serviceman's claims if the "injuries arise out of a course of activity incident to military service". The reasoning of the court is that if suit is permitted for activities incident to military service, the suit "might impair essential military discipline" and "require a civilian court to second guess military decisions." See United States v. Shearer, 473 U.S. 52 (1985) and Chappel v. Wallace, 462 U.S. 296, 300, 304 (1983).

In the case at bar, the claim does not arise out of any activity incidental to military service. The Petitioner was off duty when he was injured. The military hospital was utilized simply because it was the closest medical facility. If Petitioner's claim is allowed, "military discipline would not be affected nor would the court be second guessing any military decisions." No military decisions were involved in the negligent treatment of the Petitioner. The

Feres doctrine applies to cases where the policy or military decisions dictate that the military be allowed to operate free of the fear of potential lawsuits for military decisions. Here, the claim is for negligent medical treatment. Therefore, the Feres doctrine should not apply to these facts.

Next, the Feres doctrine bars claims involving military personnel because if such claims are permitted, "the judiciary would be involved in sensitive military affairs." No sensitive military affairs are in existence in the case at bar. The Petitioner was negligently treated. Why should the Feres doctrine be used to shield the negligent treatment of military personnel? A serviceman should not forfeit his right to quality medical treatment simply because he or she wears a military uniform. This is especially true when the medical treatment has nothing to do with military effectiveness, discipline or sensitive military policy decisions. Therefore, the Feres doctrine should not bar the Petitioner's claim.

CONCLUSION AND REQUEST FOR RELIEF

It is clear, after reviewing all the pertinent cases relevant to the issue of whether or not an injury is incident to service, that the Petitioner has a valid claim under FCTA. This court should grant the Petition and upon consideration of the merits, limit Feres so that military personnel receiving treatment at regional military medical centers (if in non-combat situations) have a remedy when the treatment failed to meet medically appropriate standards.

Respectfully submitted,

THOMAS M. TYACK & ASSOCIATES CO., L.P.A.

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614-221-1341

Counsel of Record for Petitioner

CERTIFICATE OF SERVICE

Pursuant to Rule 28.5(b) of this Court, I, Thomas M. Tyack, a member of the bar of this Court, hereby certify that on this 26th day of December, 1989

three copies of the foregoing Petition for Writ of Certorari of the Petitioner were mailed, first class postage paid, to Mr. Lowell Sturgill and Mr. Robert S. Greenspan, Attorneys for Respondent, United States of America, Department of Justice, 10th and Pennsylvania NW., Washington, D.C. 20530, and all parties required to be served pursuant to Supreme Court Rule 28.5.

THOMAS M. TYACK & ASSOCIATES CO., L.P.A.

THOMAS M. TYACK
Counsel for the Petitioner

APPENDIX

Filed
Sept. 27, 1989

No. 89-3126

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CHARLES CHAMBERLIN;

Plaintiff — Appellant

ROMONIA CHAMBERLIN

Plaintiff

v. ORDER

UNITED STATES OF AMERICA

Defendant — Appellee

BEFORE: KENNEDY and WELLFORD, Circuit Judges; and LIVELY, Senior Circuit Judge.

This cause having come on to be heard upon the record, the briefs and the oral argument of the parties, and upon due consideration thereof,

It is ORDERED that the judgment of the district court be, and it hereby is, affirmed upon the opinion of the district court.

1

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

ISSUED AS MANDATE: October 18, 1989
COSTS: None

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

CHARLES CHAMBERLIN, ET AL., :

Plaintiffs, :

vs. : Case C-2-86-0869

UNITED STATES OF AMERICA, :

Defendant. :

MEMORANDUM AND ORDER

Plaintiffs bring this action alleging negligence on the part of defendant through its employees at the Naval Regional Medical Center. The jurisdiction of this Court is invoked pursuant to 28 U.S.C § 1346 and 28 U.S.C.

Chapter 171, the Federal Torts Claims Act (FTCA). The Court previously granted in part and denied in part defendant's motion to dismiss for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted. As a result of this ruling, the claim of plaintiff, Romonia Chamberlin, has been dismissed. Memorandum and Order filed June 9, 1987. The matter is presently before the Court on defendant's motion for reconsideration of that portion of the prior order denying defendant's motion to dismiss plaintiff Charles Chamberlin's claim (Count One) for lack of subject matter jurisdiction. The facts leading to this action were previously set out in the memorandum and order filed herein on June 9, 1987.

Plaintiffs' complaint and attached exhibits allege the following facts. On August 27, 1983, plaintiff Charles Chamberlin, an enlisted member of the United States Navy, sustained a head injury when he fell out of a truck while on weekend leave from a United States naval base in South Carolina. This head injury was not sustained while engaged in any military related activity. He was admitted to the emergency ward of the Naval Regional Medical Center and released eight hours later. On August 29, 1983, he was returned to the emergency ward and then transferred to the University of South Carolina Hospital for neurological evaluation. That evaluation determined that plaintiff had

suffered bifrontal contusions, a left fronto-temporal cerebral hematoma, and an occipital skull fracture.

Plaintiff claims to have permanent brain damage with resultant reduced dexterity and psychomotor coordination which has required and will continue to require medical treatment. He states that this damage occurred because defendant negligently failed to properly treat and test plaintiff when he was first admitted to the emergency w rd on August 27, 1983.

On November 22, 1988 the United States Court of Appeals for the Sixth Circuit issued its decision in Sidley v. United States of America, No. 87-4162. In that case Sidley, a Navy serviceman, sustained injuries in an off base motorcycle accident which occurred while he was off duty. He filed a complaint alleging that the doctors at the Naval Hospital where he was stationed negligently treated his fractured leg.

In Sidley, the Sixth Circuit considered and rejected precisely the same arguments plaintiff advances in the present case:

> Sidley argues that the Feres doctrine should not bar his cause of action since he was injured in a motorcycle accident when he

was off duty and while he was off base. We note that Sidley's injuries, for which he is seeking damages under the FTCA, were the result of the Navy doctors' alleged failure to properly treat his fractured tibia and fibula of the left leg while he was being cared for at Navy hospital on the base where he was stationed. As regards the Feres doctrine, the term "incident to military service" is not a narrow term restricted to military training, field maneuvers, or combat situations. Rather, the Feres doctrine extends beyond situations where the soldier is acting pursuant to orders or while subject to direct military command or discipline. While generally an off-duty serviceman not on the military base and not engaged in military activity at the time of injury can recover under the FTCA, United States V. Shearer, 473 U.S. 52, 54 (1985), courts consistently have applied the Feres doctrine in barring servicemen's suits under the FTCA for alleged negligent medical treatment at a military hospital or medical facility. Jones v. United States, 729 F.2d 326 (5th Cir. 1984); Veilette v. United States, 615 F.2d 505 (9th Cir. 1980); Vallance v. United

States, 574 F.2d 1282 (5th Cir.), cert. denied, 439 U.S. 965 (1978); Peluso v. United States, 474 F.2d 605 (3rd Cir.). cert. denied, 414 U.S. 879 (1973); Henninger v. United States, 473 F.2d 814 (9th Cir.), cert. denied, 414 U.S. 819 (1973); Lowe v. United States, 440 F.2d 452 (5th Cir.), cert. denied, 404 U.S. 833 (1971). Sidley's treatment at the Naval hospital clearly was incident to his military service.Slip op. at 4-5 (footnote omitted).

In both the Sidley case and the present case, the serviceman was off duty and was off his military base at the time of the accident in question, but was treated for his injuries at a military medical facility. In light of the Sidley decision which this Court, of course, must follow, the Court concludes that the defendant's motion for reconsideration is well taken and it is hereby granted. Because this Court lacks jurisdiction to consider the merits of plaintiff's claims, this action is hereby DISMISSED.

IT IS SO ORDERED.

John D. Holschuh, Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

CHARLES CHAMBERLIN, ET AL., :

Plaintiffs, :

vs. : Case C-2-86-0869

UNITED STATES OF AMERICA, :

Defendant. :

MEMORANDUM AND ORDER

Plaintiffs bring this action alleging negligence on the part of defendant through its employees and the Naval Regional Medical Center. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1346 and 28 U.S.C. Ch. 171, the Federal Tort Claims Act (FTCA). This case is presently before the Court on defendant's motion to dismiss for lack of subject matter jurisdiction and for failure to state a claim upon which relief may be granted.

I. STANDARD OF REVIEW

The purpose of a motion under Fed. R. Civ. P. 12(b) (6) is to test the sufficiency of the pleading. This purpose fits within the broader purpose of Fed. R. Civ. p. 12 generally, which is to provide the defendant with a simple method for the defendant's use of the Fed. R. Civ. P. 12(b) defenses for the purpose of unwarranted delay.

When considering a motion to dismiss pursuant to Fed. R. Civ. P. 12(b) (6), a court must construe the complaint in the light most favorable to the plaintiff and accept all well-pleaded material allegations in the complaint as true. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974); California Motor Transportation Co. v. Trucking Unlimited, 404 U.S. 508, 515 (1972); Roth Steel Products v. Sharon Steel Corp., 705 F.2d 134, 155 (6th Cir. 1983); Dunn v. State of Tennessee, 697 F.2d 121, 125 (6th Cir. 1982); Smart v. Ellis Trucking Co., 580 F.2d 215, 218 n.3 (6th Cir. 1978); Westlake v. Lucas, 537 F.2d 857, 858 (6th Cir. 1976). Although the court must apply a liberal construction of the complaint in favor of the party opposing the motion to dismiss, Kugler v. Helfant, 421 U.S. 117, 125-26 n. 5 (1975); Smart v. Ellis Trucking Co., 580 F.2d at 218 n. 3; Davis H. Elliot Co., Inc. v. Caribbean Utilities Co., Ltd., 513 F.2d 1176, 1182 (6th Cir. 1975), Ott v. Midland-Ross Corp., 523 F.2d 1367, 1369 (6th Cir. 1975), a court will not

accept conclusions of law or unwarranted inferences of fact cast in the form of factual allegations. Blackburn v. Fisk University, 443 F.2d 121, 124 (6th Cir. 1971); Sexton v. Barry, 233 F.2d 220, 223 (6th Cir. 1956). However, a court will indulge all reasonable inferences that might be drawn from the pleading. Fitzke v. Shappell, 468 F.2d 1072, 1076, 1076 n. 6 (6th Cir. 1972).

When determining the sufficiency of a complaint in the face of a motion to dismiss pursuant to Fed. R. Civ. P. 12 (b)(6), a court will apply the principle that "a complaint should not be dismissed for failure to state a claim unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957). See also McClain v. Real Estate Bd. of New Orleans, Inc., 444 U.S. 232 (1980); Windsor v. the Tennesean, 719 F.2d 155, 158 (6th Cir. 1983); Neil v. Bergland, 646 F.2d 1178, 1184 (6th Cir. 1981); Parker v. Turner, 626 F.2d 1, 7 (6th Cir. 1980). Because the motion under Rule 12(b)(6) is directed solely to the complaint itself, Roth Steel Products v. Sharon Steel Corp., 705 F.2d at 155 and Sims v. Mercy Hospital of Monroe, 451 F.2d 171, 173 (6th Cir. 1983), the Court must focus on whether the claimant is entitled to offer evidence to support the claims, rather than whether the plaintiff will ultimately prevail. Scheuer v. Rhodes, 416 U.S. at 236; McDaniel v. Rhodes, 512 F. Supp. 117, 120 (S.D. Ohio

1981). A federal court cannot consider extrinsic evidence in determining whether a complaint states a claim upon which relief can be granted. Roth Steel Products v. Sharon Steel Corp., 705 F.2d at 155; Sims v. Mercy Hospital of Monroe, 451 F.2d at 173.

A complaint need not set down in detail all the particularities of a plaintiff's claim against a defendant. United States v. School District of Ferndale, 577 F.2d 1339, 1345 (6th Cir. 1978); Westlake v. Lucas, 537 F.2d at 858; Dunn v. State of Tennessee, 697 F.2d at 125. Rule 8(a)(2) simply requires a "short and plain statement of the claim showing that the pleader is entitled to relief." The function of the complaint is to afford the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. See Dunn v. State of Tennessee, 697 F.2d at 125; Westlake v. Lucas, 537 F.2d at 858.

However, the court will grant a defendant's motion for dismissal under Fed. R. Civ. P. 12(b)(6) if the complaint is without any merit due to an absence of law to support a claim of the type made or of facts sufficient to make a valid claim or if on the face of the complaint there is an insurmountable bar to relief indicating that the plaintiff does not have a claim. See generally, Rauch v. Day & Night Manufacturing Corp., 576 F.2d 697, 702 (6th Cir. 1978); Ott v. Midland-Ross Corp., 523 F.2d at 1369; Brennan v. Rhodes,

423 F.2d 706 (6th Cir. 1970).

II. STATEMENTS OF FACTS

Plaintiff's complaint and attached exhibits allege the following facts. On August 27, 1983, plaintiff Charles Chamberlin, an enlisted member of the United States Navy, sustained a head injury when he fell out of a truck while on weekend leave from a United States naval base in South Carolina. This head injury was not sustained while engaged in any military related activity. He was admitted to the emergency ward of the Naval Regional Medical Center and released eight hours later. On August 29, 1983, he was returned to the emergency ward and then transferred to the University of South Carolina Hospital for a neurological evaluation. That evaluation determined that plaintiff had suffered bifrontal contusions, a left frontotemporal cerebral hematoma, and an occipital skull fracture.

Plaintiff claims to have permanent brain damage with resultant reduced dexterity and psychomotor coordination which has required and will continue to require medical treatment. He states that this damage

occurred because defendant negligently failed to properly treat and test plaintiff when he was first admitted to the emergency ward on August 27, 1983. Plaintiff, Romonia Chamberlin, plaintiff's mother, has made a loss of consortium claim.

Plaintiff, Charles Chamberlin, submitted an administrative claim dated August 27, 1985 to the Naval Legal Service Office for his injuries. On April 14, 1986, the claim was denied on the basis of Feres v. United States, 340 U.S. 135 (1950). This action was filed on July 18, 1986.

III. LEGAL ANALYSIS

Defendant advances two arguments in support of its claim that this lawsuit must be dismissed. First, defendant argues that it cannot be held liable under the FTCA because plaintiff's injuries arose out of or were in the course of activity incident to his military service. Second, defendant claims this action is barred because plaintiff failed to timely file his administrative claim as required by 28 U.S.C. § 2401(b).

A. FEDERAL TORT CLAIMS ACT

The FTCA provides that the United States shall be liable for "injury...caused by the negligent or wrongful act or omission of any employee of the Government...under circumstances where the United States, if a private person, would be liable to the claimant..." 28 U.S.C. § 1346(b). In Feres v. United States, 340 U.S. 135 (1950), the Supreme Court recognized an exception to the government's liability in relation to members of the Armed Forces. The Court held that "the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." Id. at 146. Three factors underlie this exception: (1) the distinctly federal character of the relationship between the government and members of its Armed Forces; (2) the existence of statutory disability and death benefits; and (3) the fact that these claims, if generally permitted, would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness. Stencel Aeor Engineering Corp. v. United States, 431 U.S. 666, 671-72 (1977); accord, United States v. Johnson, 55 U.S.L.W. 4647, 4648-49 (May 18, 1967). Although all three factors play a part in the decision-making process, the Supreme Court made clear in United States v. Shearer, 473 U.S. 52, 57 (1985), that it is the third factor which best explains the Feres decision.

Although the Court in Feres based its decision on several

grounds, "[i]n the last analysis, Feres seems best explained by the peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in course of military duty." United States v. Muniz, 374 U.S. 150, 162 (1963), quoting United States v. Brown, 348 U.S. 110, 112 (1954).

The standard focuses solely upon the injured person; the military status of the alleged tortfeasor is not crucial to the application of the doctrine. Johnson, 55 U.S.L.W. at 4648. "Instead, the Feres doctrine has been applied consistently to bar all suits on behalf of service members against the Government based upon service-related injuries." Id. at 4648-49.

The focus in the present case is upon whether plaintiff's injuries were "incident to service." The term is not an easy one to define or to apply. Woodside v. United States, 606 F.2d 134, 141 (6th Cir. 1979), cert. denied, 445 U.S. 904 (1980). It is not limited to actual military activities; rather, it extends beyond situations where a soldier is acting pursuant to orders or subject to direct military control. Id. Conversely, the test is not a purely causal one. "[O]ne cannot merely state that but for the individual's

military service, the injury would not have occurred." Parker v. United States, 611 F.2d 1007, 1011 (5th Cir. 1980). The test as set forth by the Sixth Circuit in Woodside, 606 F.2d at 141, is as follows:

> Whether a service member is engaged in an activity incident to service is a question of fact,...to be determined from the circumstances of each case. It is not enough that injury or death be service-connected in that military service precede the injury-producing activity only in the sense that "all human events depend upon what has already transpired." Brooks, 337 U.S. at 52, 69 S. Ct. at 920. Rather, Feres requires that there be some proximate relationship between the service member's activity and the Armed Forces. Where the two are closely associated or naturally related, the activity will be deemed "incident to service" even though not an essential or integral part of the mission of the Armed Forces and even though not directly involving a command relationship between the soldier and the military.
>
> Conversely, when the soldier demonstrates that the activity had no significant link to the

Armed Forces and is remote to his military service, suit under the Act has been allowed. (citations omitted).

Applying this standard to the facts in Woodside, the xth Circuit found that the plaintiff was an active duty ficer who was on a five day leave from the Air Force. aintiff had a personal interest in aviation, totally unre- ted to his military duties, and was a member of the Air rce Base Aero Club. While on leave, plaintiff was taking ght instructions through the Club. The aircraft crashed lling plaintiff and his instructor. Id. at 136-37. The xth Circuit held that the lawsuit was barred because, nong other factors, it was only by virtue of plaintiff's litary service that he was able to be a member of the ro Club which had a direct and substantial link with the r Force. The Court stated:

> We recognize that at the time of his death Captain Schroeder was on leave and that he was not subject to military discipline in the sense that his movements were subject to immediate control of military authorities. Even in the absence of these factors, we find the link between the Air Force and the Club sufficient to bring Captain Schroeder's flight instructions within the realm of activities

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incident to his military service. Id. at 142.

Another Sixth Circuit case involving a serviceman on leave is Hale v. United States, 452 F.2d 668 (6th Cir. 1971). In Hale, the plaintiff was hitchhiking back to base. Two privates in a military patrol car, who could have arrested plaintiff for hitchhiking, offered him a ride back to the base. While climbing into the truck, he was struck and injured by a speeding car. The Sixth Circuit found the suit barred becausewhen appellant started to enter the M.P. truck, whether as a result of invitation or command, he re-entered a direct disciplinary relationship with his army command and as a consequence, there is no ground for reversal of the District Judge's findings that his injuries arose out of or in the course of military duty. Id. at 669.

These cases establish that a crucial factor in the Court's analysis is plaintiff's status in relation to the Naval Regional Medical Center and that Center's status in relation to the United States Navy. Plaintiff alleges that he was on leave when the injury occurred and that the Center treated civilians as well as military personnel. Whether or not plaintiff's treatment in the emergency ward re-established his link with the military sufficient to warrant a finding that the Feres exception applies is a question of fact. The mere fact that he is a serviceman who received emergency treatment at the Naval Regional Medical Center is insuffi-

cient to find as a matter of law that he can set forth no set of facts in support of his claim. "The Feres doctrine cannot be reduced to a few bright-line rules; each case must be examined in light of the statute as it has been constructed in Feres and subsequent cases." Shearer, 473 U.S. at 57.

B. STATUTE OF LIMITATIONS

28 U.S.C. § 2401(b) provides:

> A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after after such claim accrues or unless action is begun within six months after the date of mailing by certified or registered mail, or notice of final denial of the claim by the agency to which it as presented.

Defendant argues that although plaintiff's claim is dated August 27, 1985, it was not received by the agency until August 28, 1985. Because plaintiff's injury occurred on August 27, 1983, defendant argues that his claim was filed beyond the two-year statutory deadline. Plaintiff argues that from the time he first received treatment until he was discharged from the University of South Carolina

Hospital in September or October of 1983, he was essentially incoherent and it would have been impossible for him to discover the negligent treatment prior to his discharge.

The general rule in tort actions under the FTCA is that the two-year statute of limitations period begins to run when the plaintiff is injured. United States v. Kubrick, 444 U.S. 111, 120 (1979). However, when the claim is one for medical malpractice, the statue of limitations period is tolled until the plaintiff possesses the critical facts of his injury and its cause, even though he does not know or has no reason to know that the cause involved negligence. Id. at 122. Courts interpreting Kubrick have held that the statue begins to run when the plaintiff discovers, or in the exercise of reasonable diligence should have discovered, the existence of his injury and its connection with some act of the defendant. See Niclolazzo v. United States, 786 F.2d 454, 455 (1st Cir. 1986); Price v. United States, 775 F.2d 1491, 1494 (11th Cir. 1985); In re Swine Flu Products Liability Litigation, 764 F.2d 637, 639 (9th Cir. 1985); Drazan v. United States, 762 F.2d 56, 58-59 (7th Cir. 1985); Waits v. United States, 611 F.2d 550, 552 (5th Cir. 1980).

In the present case, plaintiff Charles Chamberlin was admitted to the emergency ward on August 27, 1983 and released eight hours later on the same date. At the very

earliest, plaintiff could not have been expected to know the critical facts of his injury and its cause until he was readmitted to the University of South Carolina Hospital two days later on August 29, 1983 when additional tests were run. Accordingly, taking the earliest date when plaintiff could possibly have been aware that his injury was in some way connected with the treatment he received, his administrative claim was filed within the two year limitations period.

In regard to plaintiff Romonia Chamberlin, however, there is no evidence or allegation that she ever filed a claim with a federal agency for loss of her son's services or for providing nursing services to him. Pursuant to 28 U.S.C. § 2675(a), no action can be instituted against the United States unless the claim is first presented to the appropriate federal agency. As stated earlier, pursuant to 28 U.S.C. § 2401, the claim must be filed within two years after the cause of action accrues.

The prerequisites necessary to file suit against the government under the FTCA are strictly construed since the conditions are considered to be jurisdictional. See Stewart v. United States, 458 F. Supp. 871, 872 (S.D. Ohio 1978) and cases cited therein. Although plaintiff Romonia Chamberlin's claim is derivative in nature, it is an independent action, separated and distinct from her son's claim.

In addition, neither plaintiff Charles Chamberlin's administrative claim not the transmittal letter for the claim (attached to plaintiffs' complaint) makes any mention of plaintiff Romonia Chamberlin's claim for services or loss of services. Accord, Stewart, 458 F. Supp. at 872-73. As such, her claim fails to meet the necessary statutory requirements and must therefore be dismissed. Accord Swizdor v. United States, 581 F. Supp. 10, 12 (S.D. Iowa 1983).

IV. CONCLUSION

Based upon the above, the Court takes the following action:

1. Defendant's motion to dismiss plaintiff Charles Chamberlin's claim (Count 1 of the complaint) is DENIED;

2. Defendant's motion to dismiss plaintiff Romonia Chamberlin's claim (Count 2 of the complaint) is GRANTED.

IT IS SO ORDERED.

John D. Holschuh, Judge
United States District Court

28 U.S.C. §1346

(a) The district courts shall have original jurisdiction, concurrent with the United Claims Court of:

(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws;

(2) Any other civil action or claim against the United States, not exceeding $10,000.00 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort, except that the district courts shall not have jurisdiction of any civil action or claim against the United States founded upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort which are subject to sections 8(g)(1) and 10(a)(1) of the Contract Disputes Act of 1978. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person,

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would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

(c) The jurisdiction conferred by this section includes jurisdiction of any set-off, counterclaim, or other claim or demand whatever on the part of the United States against any plaintiff commencing an action under this section.

(d) The district courts shall not have jurisdiction under this section of any civil action or claim for a pension.

(e) The district courts shall have original jurisdiction of any civil action against the United States provided in section 6226, 6228(a), 7426, or 7428 (in case of the United States district court for the District of Columbia) or section 7429 of the Internal Revenue Code of 1954.

(f) The district courts shall have exclusive original jurisdiction of civil actions under section 2409a to quiet title to an estate or interest in real property in which an interest is claimed by the United States.

28 U.S.C. §2671

As used in this chapter and sections 1346(b) and 2401(b) of this title, the term "Federal agency" includes the executive departments, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States.

"Employee of the government" includes officers or employees of any federal agency, members of the military or naval forces of the United States, member of the National Guard while engaged in training or duty under section 316, 502, 503, 504, or 505 of title 32, and persons acting on behalf of a federal agency in an official capacity, temporarily or

permanently in the service of the United States, whether with or without compensation.

"Acting within the scope of his office or employment", in the case of a member of the military or naval forces of the United States or a member of the military or naval forces of the United States or a member of the National Guard as defined in section 101(3) of title 32, means acting in the line of duty.

§ 2672. Administrative adjustment of claims

The head of each Federal agency or his designee, in accordance with regulations prescribed by the Attorney General, may consider, ascertain, adjust, determine, compromise, and settle any claim for money damages against the United States for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the agency while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred: *Provided*, That any award, compromise, or settlement in excess of $25,000 shall be effected only with the prior written approval of the Attorney General or his designee.

Subject to the provisions of this title relating to civil actions on tort claims against the United States, any such award, compromise, settlement, or determination shall be final and conclusive on all officers of the Government, except when procured by means of fraud.

Any award, compromise, or settlement in an amount of $2,500 or less made pursuant to this section shall be paid by the head of the Federal agency concerned out of appropriations available to that agency. Payment of any award, compromise, or settlement in an amount in excess of $2,500 made pursuant to this section or made by the Attorney General in any amount pursuant to section 2677 of this title shall be paid in a manner similar to judgments and compromises in like

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causes and appropriations or funds available for the payment of such judgements and compromises are hereby made available for the payment of awards, compromises, or settlements under this chapter.

The acceptance by the claimant of any such award, compromise, or settlement shall be final and conclusive on the claimant, and shall constitute a complete release of any claim against the United States and against the employee of the government whose act or omission gave rise to the claim, by reason of the same subject matter.

28 U.S.C. § 2673

The head of each federal agency shall report annually to Congress all claims paid by it under section 2672 of this title, stating the name of each claimant, the amount claimed, the amount awarded, and a brief description of the claim. June 25, 1948, c. 646, 62 Stat. 983.

Repeal

Section 1(1) of Pub. L. 89-348, Nov. 8, 1965. 79 Stat. 1310, repealed the requirement that an annual report to Congress be made of the administration adjustment of tort claims of $2,500.00 or less, stating the name of each claimant, the amount claimed, the amount awarded, and a brief description of the claim.

28 U.S.C. §2674

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgement or for punitive damages.

If, however, in any case wherein death was caused, the

w of the place where the act or omission complained of
curred provides, or has been construed to provide, for
mages only punitive in nature, the United States shall be
ble for actual or compensatory damages, measured by the
cuniary injuries resulting from such death to the persons
spectively, for whose benefit the action was brought, in lieu
ereof. June 25, 1948, c. 646, 62 Stat. 983.

U.S.C. §2675

(a) An action shall not be instituted upon a claim
ainst the United States for money damages for injury or loss
property or personal injury or death caused by the negligent
wrongful act or omission of any employee fo the Govern-
ent while acting within the scope of his office or employ-
ent, unless the claimant shall have first presented the claim
the appropriate Federal agency and his claim shall have
en finally denied by the agency in writing and sent by
rtified or registered mail. The failure of an agency to make
al disposition of a claim within six months after is is filed
all, at the option of the claimant any time thereafter, be
emed a final denial of the claim for purposes of this section.
e provisions of this subsection shall not apply to such
ims as may be asserted under the Federal Rules of Civil
ocedure by third party complaint, cross-claim, or counter-
im.

(b) Action under this section shall not be instituted for
y sum in excess of the amount of the claim presented to the
deral agency, except where the increased amount is based
on newly discovered evidence not reasonably discoverable
the time of presenting the claim to the federal agency or
on allegation and proof of intervening facts, relating to the
ount of the claim.

(c) Disposition of any claim by the Attorney General
other head of a federal agency shall not be competent
dence of liability or amount of damages.

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(As amended July 18, 1966, Pub. L. 89-506, § 2, 80 Stat. 306.)

28 U.S.C. §2676

The judgment in an action under section 1346(b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim. June 25, 1948, c. 646, 62 Stat. 984.

28 U.S.C. §2677

The Attorney General or his designee may arbitrate, compromise, or settle any claim cognizable under section 1346(b) of this title, after the commencement of an action thereon.
(As amended July 18, 1966, Pub.L. 89-506 § 3, 80 Stat. 307.)

28 U.S.C. §2677

No attorney shall charge, demand, receive, or collect for services rendered, fees in excess of 25 per centum of any judgement rendered pursuant to section 1346(b) of this title or any settlement made pursuant to section 2677 of this title, or in excess of 20 percentum of any award, compromise, or settlement made pursuant to section 2672 of this title.

Any attorney who changes, demands, receives, or collects for services rendered in connection with such claim any amount in excess of that allowed under this section, if recovery be had, shall be fined not more than $2,000.00 or imprisoned not more than one year, or both.

28 U.S.C. §2677

(a) The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suit against such federal agency on claims which are cognizable under section 1346(b) of this title, and the remedies provided by this title in such cases shall be exclusive.

(b) The remedy against the United States provided by

ections 1346(b) and 2672 of this title for injury or loss of roperty of personal injury or death, resulting from the operaon by any employee of the Government of any motor vehicle hile acting within the scope of his office of employment, hall hereafter be exclusive of any other civil action or proeeding by reason of the same subject matter against the mployee or his estate whose act or omission gave rise to the laim.

(c) The Attorney General shall defend any civil action r proceeding brought in any such damage or injury. The mployee against whom such civil action or proceeding is rought shall deliver within such time after date of service or nowledge of service as determined by the Attorney General, ll process served upon him or an attested true copy thereof to is superior or to whomever was designated by the head of his epartment to receive such papers and such person shall romptly furnish copies of the district embracing the place herein the proceeding is brought, to the Attorney General, nd to the head of his employing Federal Agency.

(d) Upon a certification by the Attorney General that he defendant employee was acting within the scope of his mployment at the time of the incident out of which the suit rose, any civil action or proceeding commenced in a State ourt shall be removed without bond at any time before trial y the Attorney General to the district court of the United tates for the district and division embracing the place wherein is pending and the proceedings deemed a tort action brought gainst the United States under the provisions of this title and l references thereto. Should a United States district court etermine on a hearing on a motion to remand held before a ial on the merits that the case so removed is one in which a medy by suit within the meaning of subsection (b) of this ction is not available against the United States, the case shall e remanded to the State court.

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(e) The Attorney General may compromise or settle any claim asserted in such civil action or proceeding in the manner provided in section 2677, and with the same effect. June 25, 1948,c. 646, 62 Stat. 984; Sept. 21, 1961, Pub.L. 87-258, § 1, 75Stat.539.

§ 2680. Exceptions

The provisions of this chapter and section 1346(b) of this title shall not apply to-

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.

(d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States

(g) Repealed. Sept. 26, 1950, c. 1049, § 13(5), 64 Stat. 1043.

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference-with contract rights: *Provided*, That, with regard to acts of omissions of investigative or law enforcement officers of the United States Government, the provisions of the chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the Panama Canal Company.

(n) Any claim arising from the activities if a Federal land bank, and Federal intermediate credit bank, or a bank for cooperatives.